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In The

Supreme Court of the United States

October Term, 1977

Nos. 77-25
77-37
77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc.,

Petitioners,

-and-

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Petitioner,

-and-

AMERICAN WAREHOUSEMEN'S ASSOCIATION AND THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC.,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS, GLORIA JONES, individually and on behalf of all other similarly situated,

Respondents,

-and-

WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC. and THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK,

Respondents in Support of Petitions.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

BRIEF FOR PETITIONERS FLAGG BROTHERS, INC., and HENRY FLAGG

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS FLAGG BROTHERS, INC. and HENRY FLAGG

JURISDICTION

Petitioners, FLAGG BROTHERS, INC. and HENRY FLAGG invoke the jurisdiction of the Supreme Court under 28 U.S.C. Section 1254(1).

The judgment sought to be reviewed was entered April 7, 1977 (A192a).[1] Petitioners filed their petition for certiorari on July 5, 1977 and the Supreme Court granted the petition on October 3, 1977. *Brooks v. Flagg Brothers, Inc.*, ____ U.S. ____, 46 U.S.L.W. 3215 (Oct. 4, 1977).

OPINIONS BELOW

1. The opinion of the Second Circuit finding state action in a warehouseman's lien foreclosure sale pursuant to N.Y.U.C.C. §7-210 is reported at 553 F.2d 764 (April 7, 1977) and in the Appendix beginning at page 159a.

2. The opinion of the United States District Court for the Southern District of New York, finding state action absent in a warehouseman's lien foreclosure sale, is reported at 404 F. Supp. 1059 (1975) and in the Appendix beginning at page 141a.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, and the following federal and state statutes: 28 U.S.C. §1343(3); 42 U.S.C. §1983; and N.Y.U.C.C. §7-210, in 62½ McKinney's Cons. L. of N.Y. Ann., Pt. 3, at 55-57 (Ed. Thompson Co. 1964).

All of these provisions are set forth in their entirety in the appendix to this brief, marked Appendix A.

1. References to the single appendix filed on this review will be designated by (A___a).

QUESTIONS PRESENTED

1. Is the "state action" requisite under the Fourteenth Amendment due process clause and under 42 U.S.C. §1983, prohibiting deprivation of a federally protected right while acting "under color of" state law, present in the enforcement of a lien by a warehouseman after default in payment of storage charges as permitted under New York Uniform Commercial Code §7-210?

2. Is a New York warehouseman's right of lien foreclosure sale in satisfaction of delinquent storage charges under the Uniform Commercial Code and its predecessor statutes an exercise of a power traditionally associated with sovereignty which has been delegated to the warehouseman by the state so as to bring the sale within the purview of the Fourteenth Amendment as the action of the state?

STATEMENT OF THE CASE

A. The Contested Statute

This case involves the constitutionality, under procedural due process, of the creditor collection remedy of summary sale of collateral, as made available to a warehouseman in New York. Section 7-210 of the Uniform Commercial Code, enacted in New York as N.Y.U.C.C. §7-210, permits a warehouseman to satisfy his statutory lien (§7-209) for delinquent storage charges by selling the goods in storage without prior court action. Subsection (2) of the statute requires the warehouseman of household goods to observe detailed notification, publication and sales procedure requirements in order to foreclose his lien.[2]

The full text of N.Y.U.C.C. §7-210 is reproduced in Appendix A to this brief, *infra*. Appendix B shows where §7-210

2. N.Y. U.C.C. §7-210 and Official Comment 1, in 62½ McKinney's Laws, Pt. 3, *supra*, at 55-57, 58.

may be found in the statutes of the 49 states, the District of Columbia and the Virgin Islands, all of which jurisdictions have adopted the Code provisions, intact and verbatim except for minor differences in some states basically pertaining to the manner of mailing the sales notice. These local variations are all noted in Appendix B hereto.

B. The Petitioners

Petitioner FLAGG BROTHERS, INC. (hereinafter "FLAGG BROTHERS") is a New York corporation engaged in the business of household moving and storage and maintains an office and place of business in Mount Vernon, Westchester County, New York. Petitioner HENRY FLAGG is the president of FLAGG BROTHERS (A98a). The record demonstrates that petitioner FLAGG, far from being a titular head of a large corporation, actively participates in the business, daily carrying out functions of salesman and business manager in addition to discharging executive responsibilities (A11a-13a, 20a-21a, 24a-25a).

Petitioner FLAGG BROTHERS holds a certificate issued by the New York State Department of Transportation authorizing it to transport household goods as a common carrier of property by motor vehicle within the New York City Commercial Zone. The law requiring such licensing has no application to the storage business.[3]

3. N. Y. Transportation Law §162(1), applicable only to a "common carrier of property by motor vehicle." The term "common carrier of property by motor vehicle" is defined at Transp. L. §2, subd. 15, as "a person or corporation undertaking. . . to transport property or any class thereof, for the general public by motor vehicles for compensation. . . within a defined territory. . ." The New York City Commercial Zone is defined by Department of Transportation regulations at 17 N.Y.C.R.R. §850.1 (1974). An Assembly bill introduced in the New York State Legislature in its last regular session provided for regulation of household goods storage by the Department of Transportation. A. 4505, 200th New York Legislature, regular session (Feb. 8, 1977). It was not enacted.

Nothing in the record shows the warehouse facilities used by FLAGG BROTHERS are other than privately owned and managed without governmental subsidy or other support. The facilities are not shown to be physically or financially integrated with any governmental project or publicly dedicated property.

In short, the record shows FLAGG BROTHERS is a private corporation with the normal duties and privileges attendant to such status.

C. Respondent Brooks

The verified complaint of respondent, SHIRLEY HERRIOTT BROOKS, alleges that on June 13, 1973, respondent, then residing in the City of Mount Vernon, Westchester County, New York, was evicted from her apartment. On the same day she engaged petitioners' services who removed her household belongings from the sidewalk and stored them in storage space maintained by petitioner FLAGG BROTHERS (A10a-11a). Although some money was paid by respondent a dispute arose as to the charges due.

On or about August 25, 1973 respondent BROOKS received a letter dated August 22, 1973 from petitioner FLAGG demanding payment of delinquent storage charges within 10 days to avert a foreclosure sale. A "Final Notice" form in the same tenor, bearing date of August 22, 1973, accompanied the letter (A12a-13a, 20a-21a). The letter and "Final Notice" did not comport with the notification prerequisites of §7-210(2)(c). The threatened sale was not carried out.

D. Respondent Jones

The intervenor's complaint of respondent, GLORIA JONES, alleges that on November 26, 1973, the respondent was evicted from her apartment in the City of Mount Vernon, Westchester County, New York. The complaint further alleges

that without any written or oral authorization from respondent, employees of petitioner FLAGG BROTHERS, in respondent's presence, removed her household belongings from the sidewalk onto a company truck for removal to a storage facility maintained by petitioner FLAGG BROTHERS. Respondent JONES' storage charges were paid by the Westchester County Department of Social Services until January 31, 1974, when the Department informed respondent that it would not pay for her storage after that date (A45a, 102a, 106a).

In March, 1974 respondent JONES contacted petitioner FLAGG BROTHERS, at which time she was advised that her account was in arrears some $600. She was also informed that her goods were on the verge of being sold (A46a).

There was further contact between respondent and petitioners, but no payment for the storage was made or tendered by her. Responent's household belongings were not sold.

E. Prior Proceedings

On September 20, 1973 respondent BROOKS commenced this action as a class action in the United States District Court for the Southern District of New York, contending that the threatened sale of her household goods by petitioners pursuant to N.Y.U.C.C. §7-210 in satisfaction of charges, without hearing prior to sale, violated her right under the Fourteenth Amendment against deprivation of property without due process of law. Respondent sought declaratory relief and, under 42 U.S.C. §1983, a permanent injunction and damages against the petitioners, named as individual defendants and as representatives of the class of all warehousemen in the state who impose liens and sell encumbered goods pursuant to N.Y.U.C.C. §§7-209 and 7-210. Jurisdiction of the District Court was invoked under 28 U.S.C. §1343(3).

On April 10, 1974, petitioners filed an answer denying the presence of state action requisite to sustain a claim under 42 U.S.C. §1983 and the Fourteenth Amendment (A35a-36a).

Thereafter, the Attorney General of the State of New York, American Warehousemen's Association, The International Association of Refrigerated Warehouses, Inc., Warehousemen's Association of New York and New Jersey, Inc. and The Cold Storage Warehousemen's Association of the Port of New York were permitted to intervene as defendants pursuant to Fed. R. Civ. P. 24(b). By the same District Court order respondent JONES was permitted to intervene as a plaintiff.[4]

Respondents then moved for a class action determination under Fed. R. Civ. P. 23 and for summary judgment declaring the unconstitutionality of N.Y.U.C.C. §7-210. Petitioners cross-moved to dismiss the complaints for failure to state a claim under the Fourteenth Amendment and §1983, pursuant to Fed. R. Civ. P. 12(b)(6).

On July 7, 1975 the District Court issued its opinion and order denying respondents' motion for summary judgment and granting petitioners' cross-motion to dismiss the complaints. No ruling was made on the class action determination. *Brooks v. Flagg Brothers, Inc., supra,* 404 F. Supp. 1059 (A141a). The District Court found that there was insufficient state involvement in the enforcement of a warehouseman's lien to confer jurisdiction upon a Federal District Court under §1343(3) or to state a claim for relief under 42 U.S.C. §1983.

Respondents appealed to the Second Circuit, which by a divided vote reversed the District Court's dismissal and remanded the case to the District Court for class action determination and for a determination on the issue of due process. *Id.,* 554 F.2d 764 (April 7, 1977) (A159a). The majority

4. *Brooks v. Flagg Brothers, Inc.,* 63 F.R.D. 409 (S.D.N.Y. 1974), reprinted in Petition for Certiorari in No. 77-37, at 47a.

panel held that the warehouseman's right of summary sale represented the delegation to the warehouseman of "distinctly governmental power", the power of "binding conflict resolution". The majority defined this power of binding conflict resolution as the power of the warehouseman to "finally and unilaterally" resolve disputes with customers over storage charges. The statutory delegation of binding conflict resolution to warehousemen creditors, coupled with the historical fact that the power of sale did not exist at common law, was in the majority's opinion sufficient state involvement in a warehouseman's lien sale to constitute the sale as the action of the state. *Id.* at A173a.

The dissenting judge below agreed with the District Court's opinion that the enforcement of a warehouseman's lien was never a public function and that the requisite significant degree of state involvement in essentially private conduct is not present in the case of a warehouseman's lien sale. *Id.* at A187a.

Thereafter, petitioners filed their petition to this Court for writ of certiorari to review the Second Circuit's decision. The petition was granted on July 5, 1977.

F. The Legislative History of N.Y.U.C.C. §7-210

The New York warehouseman's lien sale statute has a long history. While the right of sale itself first appears as a general law in 1879, the right of sale as a statutorily-created warehouseman's remedy goes back at least to 1859, 10 years before warehouses were allowed to do business in the state in corporate form (without a special legislative enactment, or charter law), Cary On Corporations (4th Ed. 1969) at 3-4,[5] Ch.

5. Ch. 605 (1869) N.Y. Laws 1443, allowing the business of warehousing to be conducted in corporate form.

The earliest New York statute conferring a right of sale to a private party uncovered by counsel's researches is Ch. 282 (1854) N.Y. Laws 608, allowing (Cont'd)

405 (1859) N.Y. Laws 944 was a legislative enactment chartering the "United States Warehouse Company" to engage in "carrying on the business of warehouseman" as a corporation. Section 3 of the charter act provided in part:

> "The said corporation is hereby authorized to receive and collect the usual and customary rates of dockage, . . . together with all charges and expenses incurred for labor or otherwise in the receipt, delivery or custody of merchandise received by or stored with them; and advances . . . with interest and commissions at the usual and customary rates.
>
> All of which charges, expenses, advances, interest and compensation as above specified, shall be a lien on said merchandise, and in case the same shall be in arrears and unpaid or the goods be unclaimed for one year, the said goods, . . . may be sold at public auction, thirty days' public notice of the time and place of such sale being given, by publication in at least three of the daily papers printed in the town or city where the operations of this corporation may be carried on."

Subsequent charter enactments establishing warehouse corporations contained provisions conferring the right of sale in

(Cont'd)

railroad companies to sell unclaimed freight in their possession one year, upon meeting specified notice requirements. This 123-year-old right of summary liquidation of abandoned property still is in force today, N.Y. Rd. L. §68, and is extended to freight and baggage left on the lines of water carriers, Gen. Bus. L. §§281-82, and express companies, Gen. Bus. L. §285.

enforcement of the warehouse company's lien for unpaid charges.[6]

In 1879 the New York State Legislature passed "An act to enable warehousemen to collect their charges upon goods deposited with them by the sale thereof."[7] The Session Laws page containing the act is set forth as Appendix C to this brief. An important feature of this seminal act was a precondition that the storage charge be two years overdue and that the period of storage end at least six months prior to noticing the sale.[8]

In 1897 the Legislature redistributed and further codified the miscellaneous creditor's lien statutes enacted to that date, including the warehouseman's lien sale statute, into a single title of the consolidated laws becoming the Lien Law.[9]

In 1907, New York adopted the Uniform Warehouse Receipts Act, which at §33 pared away a separate lien sale right for warehousemen from the right of sale to satisfy a lien on personal property previously enacted as Lien Law §80.[10] Section 33 of the Warehouse Receipts Act was codified as §118 of the

6. Ch. 404, §3 (1859) N.Y. Laws 940 ("Staten Island Warehousing Co."); Ch. 378, §§6, 8, 9 (1867) N.Y. Laws ("The Commercial Warehouse Co. of New York"); Ch. 800, §§6, 8, 9 (1868) N.Y. Laws 1789 ("Commercial Warehouse Co. of Albany").

7. Ch. 336 (1879) N.Y. Laws 417.

8. *Id.*, §1.

9. Ch. 418 (1897) N.Y. Laws 514. Examples of the sales remedies covered by this major enactment, a harbinger of the adoption of the Uniform Commercial Code 65 years later, are: Warehouseman's right of sale; Hotel and innkeepers, lodging house and boarding house keepers (§80); Factors as commission agents (§80); Conditional sale, right of resale by vendor (§§110-118); Chattel mortgagee, right of strict foreclosure (§§90-98).

10. Ch. 732 (1907) N.Y. Laws.

Gen. Bus. L.,[11] and except for a minor amendment with respect to the place of sale remained the law in New York until 1962.

In 1962, New York adopted the Uniform Commercial Code including §7-210 thereof, the statute challenged in this action.[12]

SUMMARY OF ARGUMENT

I. The primary purpose of the Fourteenth Amendment and of 42 U.S.C. §1983 was to eradicate racial discrimination through enforcement of the equal protection guaranty against ostensibly private persons. *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961). At the same time that the civil rights laws were being enacted, a legislative movement was underway in New York and other states to codify and extend to other creditors, including the warehouseman, the common law right of certain creditors to summarily sell encumbered goods to satisfy unpaid sales prices, service charges and outstanding loans. This statutory movement is represented today in adoption of the Uniform Commercial Code by 49 states, the District of Columbia and the Virgin Islands. This case involves a challenge to a key section of the Code which confers the right of sale and which is substantially exact in all of the adopting jurisdictions. Petitioners contend that the basis of that challenge is without foundation because the civil rights laws were not intended to apply to the right of foreclosure sale.

The application of the public function theory to find state action in the private acts of a warehouse company, in a case devoid of racial overtones, requires a strong showing of state involvement, in light of the Amendment's and §1983's purpose, and the Supreme Court's requirement of "significant" state

11. Ch. 25 (1909) N.Y. Laws.

12. Ch. 553, §§7-210, 10-102 and repealer schedule annexed (1962) N.Y. Laws 2580.

involvement to overcome this limitation. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972). This burden of proof cannot be met, as a matter of constitutional law, by characterizing the private acts as the performance of a function of sovereignty delegated to the warehouseman by a statute permitting, but not requiring, its performance.

The fact that the warehouseman did not have this right of sale at common law does not lend any additional weight to support a finding of state action.

II. Even if the delegation of a function of sovereignty to private hands were sufficient to fairly treat the private party's actions as those of the state, *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1973), such a function does not exist in the case of the warehouseman's lien foreclosure sale conducted pursuant to New York Uniform Commercial Code §7-210.

The majority of the Second Circuit predicates its characterization of the warehouseman's right of sale as a function of sovereignty upon finding that this is an "extraordinary" and a "drastic" remedy. The warehouseman's right of sale is far from extraordinary, other creditors having a right of sale, some even at common law. In comparison to these statutory rights, the warehouseman's statute is far less drastic, being so hemmed in by notice and publication requirements as to support the argument that it discourages, rather than encourages, sales. *Reitman v. Mulky*, 387 U.S. 369 (1967); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 212 (1970). Its rationale thus lacking any valid basis in fact, the Second Circuit's association of the warehouseman's lien sale with a function of sovereignty is erroneous.

It is incorrect, in the abstract, to define the dispute-resolving nature of the lien sale as a function of sovereignty, as the Second Circuit did. The Second Circuit's reliance upon *Boddie v. Connecticut*, 401 U.S. 371(1971), is misplaced, for that

case only classifies as a sovereign function the resolution of disputes which the state exclusively has resolved, such as dissolution of marriage. In contrast, commercial arbitration and other forms of private resolution of creditor-debtor disputes are traditional. Their resolution is not a sovereign function, in terms of *Boddie*, a fact which the nonconsensual nature of their resolution in certain instances cannot alter.

ARGUMENT

I.

THE STATE'S DELEGATION OF A GOVERNMENTAL POWER OF SOVEREIGNTY TO A PRIVATE PARTY DOES NOT, *IPSO FACTO*, TRANSMUTE THE PRIVATE PARTY'S ACTS INTO STATE ACTION.

A. The doctrine of state action, when viewed in the light of the historical purpose of the Fourteenth Amendment and 42 U.S.C. §1983, shows that the "public function" character of essentially private acts, in a nonracial setting, is insufficient to invoke the protection of constitutional guarantees.

The majority panel of the Court of Appeals found that the Fourteenth Amendment, which prohibits the State of New York from depriving individuals of their property without due process of law, and 42 U.S.C. §1983,[13] providing civil redress for such deprivation, apply to privately undertaken storage activities of a manifestly private and owner-operated warehouse company in Mount Vernon, New York and its president, individually. The majority reached its finding of state action despite the threshold command of the Fourteenth Amendment that:

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13. The "under color of" requirement for recovery under 42 U.S.C. §1983 requires that the deprivation result from state action. *United States v. Price*, 383 U.S. 787, 794 n.1 (1966); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150-152 and n.7 (1970).

> "It is state action . . . that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment."

Civil Rights Cases, 109 U.S. 3, 11 (1883); *see also, Shelley v. Kraemer,* 334 U.S. 1, 13 (1948). The Supreme Court in *Shelley* was explicit that the bedrock principle of the Fourteenth Amendment's nonapplication to private conduct is not affected by the conduct's wrongfulness or hurtfulness:

> "That (the Fourteenth) amendment erects no shield against merely private conduct, however discriminatory or wrongful."

In hurdling the threshold "state action" barrier, the majority below gave no consideration to the history and original purpose of these two cornerstones of the civil rights laws. This was in error for three reasons:

First: Statutory construction normally includes consideration of the enactment's purpose as revealed in its legislative history. Courts are especially enjoined to engage in such a cautious "sifting facts and weighing circumstances" analysis when the preliminary "state action" question of the civil rights laws' applicability is involved. *Burton v. Wilmington Parking Authority,* 365 U.S. 715, 722 (1961).[14]

Second: The legislative history of the Fourteenth Amendment and §1983 is of particular importance to this case for it serves to explain lower courts' and the Supreme Court's

14. In *Burton,* Mr. Justice Clark, writing for the Court, assured those opposing the Fourteenth Amendment's application to that case, prophesizing its "nigh universal application," that the Court's finding of state action was limited to the facts of that case, since the Fourteenth Amendment is "so peculiarly dependent for its invocation upon appropriate facts," *Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 725-26.

doctrinal development of the "public function" theory upon which the majority of the Second Circuit relies.

Third: The legislative intent together with the other facts and circumstances of this case compel the conclusion that the Second Circuit erred in relying upon the public function theory as determinative of state action; further, that a warehouseman's lien foreclosure sale pursuant to N.Y.U.C.C. §7-210 is not "state action" within the meaning of the Fourteenth Amendment and 42 U.S.C. §1983.

1. Legislative History of Civil Rights Laws

The Fourteenth Amendment was the second in a succession of three Post-Civil War Reconstruction-era amendments to the Constitution enacted between 1865 and 1869. The Fourteenth Amendment was enacted in the Civil Rights Act of 1866 and ratified in 1868. Its purpose was to eradicate race discrimination and to guarantee the privileges and immunities of United States citizenship to all citizens. *Oregon v. Mitchell,* 400 U.S. 112, 151-200 (1970) (Harlan, J., concurring and dissenting).

In 1871, the Congress, exercising its legislative powers under the enabling clause of the Fourteenth Amendment, enacted the "anti-Ku Klux Klan Act of 1871." Section 1 provided for civil redress of deprivations of constitutional rights, privileges and immunities and is now embodied in 42 U.S.C. §1983, the statute upon which respondents base their lawsuit. The paramount legislative purpose of this act was to stem the tide of violent political repression and to implement the Fourteenth Amendment's guaranty of equal protection of the laws. *Monroe v. Pape,* 365 U.S. 167, 172-183 (1961); *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 188 at 203-206 (Brennan, J., concurring and dissenting); *Collins v. Hardyman,* 341 U.S. 651, 656-57 (1951).

Equal in significance to the intent of the Fourteenth Amendment and §1983 is recognizing what their enactment was not intended to achieve. The debate in the 39th and 42nd Congresses was primarily concerned with Reconstruction issues and not with unforged *in rem* rights of debtors against creditors' *ex parte* pre-judgment remedies.[15] Detainer and other creditor security devices existing at common law included the lien of the innkeeper, warehouseman, common carrier, artisan and factor, title retention by chattel mortgagee and by vendor under conditional sale; field warehousing; the ancient pledge. 1 G. Gilmore, *Security Interests in Personal Property* §§3.2, 3.5, 5.2, 4.1 and 4.2 (1965); R. Brown, *The Law of Personal Property* §§10.7, 13.1, 13.2, 15.1, 17.1 (3d Ed. 1975); *Davis v. Richmond,* 512 F.2d 201 (1st Cir. 1975) (innkeeper's lien); *Knapp, Stout & Co. v. McCaffrey,* 177 U.S. 638, 644-45 (1900) (carrier's lien); *Markham v. Jandan,* 41 N.Y. 1 (1869) (pledge of stock certificates).

The default remedy of extrajudicial sale was also available to certain creditors: the factor, the conditional sale vendor, the chattel mortgagee under strict foreclosure and the pledgee under a simple pledge. 1 G. Gilmore, *supra,* §§3.2 at 67-68, 4.2 at 87-88 and n.2; R. Brown, *supra,* §§10.7 at 247-48, 13.1 at 392-93; ALI, Restatement of Security §§48(a), 72(2) (1941).

The legislative codification and extension of common law rights of sale to further classes of creditors which occurred in New York was representative of legislative developments in the other states. 2 G. Gilmore, *supra,* §33.2 at 873-74, §44.6 at 1238; Brief *amicus curiae* of Permanent Editorial Board of Uniform Commercial Code, *Adams v. Southern California First Nat'l Bank,* 492 F.2d 324 (9th Cir. 1973), *cert. denied,* 419 U.S. 1006 (1974) at App. B., pp. 1-4. *See also,* in regard to New York

15. In *Sniadach v. Family Finance Corp.*, 395 U.S. 337, decided in 1969 as the first of four procedural due process cases decided in an economic context, the Supreme Court struck down *ex parte* prejudgment attachment of wages for lack of notice and prior opportunity to be heard.

statutory developments, Ch. 539 (1879) N.Y. Laws (conferring right of sale of guest's property to innkeepers). The members of the 39th and 42nd Congresses were undoubtedly acquainted with these creditor security and foreclosure devices and had no intention of reaching out through the due process clause and §1983 to eliminate them. *Anastasia v. Cosmopolitan Nat'l Bank,* 527 F.2d 150, 156 (7th Cir. 1975), *cert. denied,* 424 U.S. 928 (1976); *Gibbs v. Titelman,* 502 F.2d 1107, 1114 (2d Cir. 1974); *see gen.,* W. Burke and D. Reber, *State Action, Congressional Power and Creditors' Rights: An Essay on the Fourteenth Amendment* (two parts), 46 S. Cal. L. Rev. 1002 (1972-1973), 47 S. Cal. L. Rev. 1 (1973-1974).

The fact that these remedies were of the "self help" variety is a further circumstance bearing upon congressional intent and its role in the proper resolution of the state action issue. If state action is found to exist in a warehouseman's lien sale, a greater violence would be done to legislative intent than striking down as unconstitutional a creditor remedy not intended to be outlawed. Being aware that these remedies were legitimized by the common law of the states' courts and, increasingly, by the legislatures of the several states, and being aware of the arguments about states' rights to govern matters which the Constitution left to traditional state control,[16] it is hardly conceivable that the civil rights enactments' supporters intended to overrule the states' widening authorization of private creditor remedies. Their intentions in enacting the Fourteenth Amendment and §1983 would be doubly thwarted in a finding of state action herein, removing the barrier against congressional

16. For example, Rep. Hoar, in support of the Ku Klux Klan bill, stated:

> "... particular class of persons are denied their civil rights ... frequently and as a rule in any State, we have a right to interfere simply to protect those rights, leaving the republican form of government, as far as it is enforced in regard to others, untouched where we can."

Cong. Globe, 42 Cong. 1st Sess. 320-21 (1871).

and Supreme Court regulation of interpersonal creditor-debtor relationships, which the 39th and 42nd Congresses thought were and would remain within the exclusive province of the states.

2. Development of Public Function Theory

The Circuit Courts, realizing the paramount purpose of 42 U.S.C. §1983 to eradicate invidious discrimination in all its manifestations, have advocated a dual test of state action. If racial discrimination is involved the test is less onerous than in a case devoid of racial overtones. *Fletcher v. Rhode Island Hospital Trust Nat'l Bank*, 496 F.2d 927, 931 (1st Cir. 1974); *Jackson v. Statler Foundation*, 496 F.2d 312, 328-29 (2d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); *James v. Pinnex*, 495 F.2d 206, 209 (5th Cir. 1974); *Turner v. Impala Motors*, 503 F.2d 607, 611 (6th Cir. 1974); *Adams v. Southern Cal. First Nat'l Bank*, 492 F.2d 324, 333 and n.24 (9th Cir. 1974), *cert. denied*, 119 U.S. 1006 (1974); *see also Oller v. Bank of America*, 341 F. Supp. 21, 23 (N.D. Cal. 1972).

The Supreme Court has shown a like awareness of the purpose of the civil rights laws. From *Nixon v. Condon*, 286 U.S. 73 (1932), to *Griffin v. School Bd. of Prince Edward County*, 377 U.S. 218 (1961), to *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), the Supreme Court has hurdled the state action threshold to reach governmental action denying equal protection of the laws through race discrimination, notwithstanding that the discrimination was perpetrated by one group of individuals acting against another. In these cases the Supreme Court found that the state sought to circumvent the equal protection guaranty by placing traditionally governmental functions, such as conducting elections, *Nixon v. Condon, supra*, operating schools, *Griffin v. School Board, supra*, providing public recreational facilities, *Gilmore v. City of Montgomery, supra*, into the hands of private agencies who then claimed that their racially discriminatory policies were private actions beyond Fourteenth Amendment

purview. To defeat this subterfuge the Supreme Court developed the public function theory of state action, holding that a nominally private party; in performing a function traditionally the state's, becomes the instrumentality of the state and must be held accountable to Fourteenth Amendment guaranties, the same as though the state itself were acting.

> "That is to say, when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

Evans v. Newton, 382 U.S. 296, 299 (1966).

The companion cases of *Evans v. Newton*, 382 U.S. 296 (1966), and *Evans v. Abney*, 396 U.S. 435 (1970), demonstrate that the public function theory has its limitations, even in a race discrimination/equal protection context. In *Evans v. Newton*, state action was found in the transfer of custodianship of a segregated park to private trustees.[17] The private trustees were held to be performing a traditional public function.

In *Evans v. Abney*, no state action was found in the transfer of ownership of the park pursuant to Georgia trust statutes subsequent to the *Evans v. Newton* decision. The holding of *Evans v. Abney* was that state law recognizing private discriminatory intentions was not state action, since the state did not put its weight or authority behind the discrimination. *Id.*, 396 U.S. at 444.

Evans v. Abney was consistent with *Shelly v. Kraemer*, 334 U.S. 1, and with *Barrows v. Jackson*, 346 U.S. 249 (1953), finding state action where the state did put its weight and

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17. The City of Macon's ongoing entwinement in maintaining the park was an additional important indicium of state action in *Newton*.

prestige behind private discrimination, so that, in the language of *Barrows v. Jackson*, 346 U.S. at 254:

> ". . . . it becomes not respondent's voluntary choice but the State's choice that she observe her covenant (forbidding use or occupancy of residential property by Negroes) or suffer damages."

Cf. Reitman v. Mulky, 387 U.S. 369 (1967).

Thus, "where the impetus for discrimination is private," that is, a private party was following its own decision to discriminate in alleged violation of equal protection rights, the bare fact of some form of state aid or regulation, or of state permission or delegation of functions normally performed by government, was not enough to constitute state action, even in the context of race discrimination. "Significant", "affirmative" state involvement, the state placing its power and prestige behind the challenged activity, all but ordering it, was required. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-173 (1972); *Reitman v. Mulky, supra*, 387 U.S. at 375; *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963).

Outside the context of racial discrimination, the Supreme Court has been less willing to find state action in challenged activities, on a public function theory, even when the constitutional rights sought to be vindicated were sensitive First Amendment rights of speech, press and religion. *Compare Marsh v. Alabama*, 327 U.S. 501 (1946), *with Hudgens v. NLRB*, 424 U.S. 507 (1967); *cf. Columbia Broadcasting System, Inc. v. Democratic Nat'l Committee*, 412 U.S. 94, 116 (1973) (finding no state action by governmentally-licensed radio broadcaster, a "public trustee" performing "statutory duties") (plurality opinion). Given the historical purposes and intentions of the Fourteenth Amendment and its legislative progeny, this course of development of the "public function" state action doctrine is sound.

J. Jackson v. Metropolitan Edison Company

The Court has not decided the state action issue on the basis of delegation to a private party of a function traditionally associated with sovereignty, in the abstract, devoid of other relevant indicia of state involvement. The Court was not confronted with this issue in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), the most recent state action case closest in point to the instant case, because the Court held that such a public function was not involved and because there were numerous indicia of state involvement of the type relied upon by the lower courts: Metropolitan Edison's virtual monopoly economic status; its receipt of substantial benefits from the state; its extensive regulation by the state. Despite these traditional state action indicia, the Court held that the State of Pennsylvania was not significantly involved in Metropolitan Edison's utility cut-off procedures so as to require imposition of a pretermination notice and hearing under due process.

The *Jackson* decision shows that the type of constitutionally-protected right being asserted in a §1983 action has a different weight depending on whether or not it involves racial discrimination. *Adickes v. S. H. Kress & Co., supra*, 398 U.S. at 188, 190-191 (Brennan, J.); Note, *State Action and the Burger Court*, 60 Va. L. Rev. 840 (1974).

The public function theory in the abstract is a poor test, standing by itself. As stated by Mr. Justice Brennan, dissenting in *C.B.S., Inc. v. Democratic Nat'l Committee, supra*, 412 U.S. at 170, 173, quoting *Reitman v. Mulky, supra*, 387 U.S. at 378:

> "(T)his Court has never attempted the impossible task of formulating an infallible test for determining in all instances whether particular conduct must be deemed private or governmental."

Glennon and Nowak, *A Functional Analysis of the Fourteenth Amendment 'State Action' Requirement*, 1976 Sup. Ct. Rev. 221 (1976).

B. In the absence of any other relevant indicia of state action in a warehouseman's lien foreclosure sale, the mere delegation of a sovereign function is insufficient to constitute state action in a case not involving racial discrimination.

1. The statutory origin of the warehouseman's right of sale is an immaterial factor.

The instant case presents none of the indicia of state action present and found insufficient in *Jackson*. Petitioner FLAGG BROTHERS is not a monopoly utility. It receives no more state benefits than other private companies. Its storage activities are not regulated by the state. Thus, a finding of no state action in *Jackson* compels a like finding here, on *a fortiori* grounds. The Second Circuit finding of a delegation of sovereign function standing alone, as it does in the case at bar, is insufficient. Assuming *arguendo* that such a delegation exists, the facts of this case, in which a private entrepreneur has made a privately-motivated business judgment to engage in the challenged function, without participation of any state official, and with no vestige of racial discrimination involved, compel the conclusion that the mere statutory delegation of a function of sovereignty is not state action.

The Second Circuit coupled the statutory delegation of a sovereign function with the corresponding expansion of common law default remedies as the basis of its decision. The one is the reiteration of the other. The second criterion, therefore, adds nothing to the analysis. In fact, giving consideration to the common law versus statutory source of a sales creditor's remedy can lead to the anomalous result that the same remedy might be state action in one state and not in another because of the accident of each state's different legislative

history. *Davis v. Richmond, supra*, 512 F.2d at 203; 2 Burke and Reber, *supra*, 47 S. Cal L. Rev. at 47.

This is precisely what has happened as a result of the Eighth Circuit's reliance upon historical origins in *Cox Bakeries of North Dakota, Inc. v. Timms Moving & Storage, Inc.*, 354 F.2d 356 (8th Cir., May 12, 1977). In North Dakota, under the *Timms* decision, the warehouseman's exercise of his sales right, pursuant to a North Dakota statute worded exactly like N.Y. U.C.C. §7-210 (see Appendix B of petitioners' brief, *infra*), is state action because the lien foreclosure was traditionally the function of the sheriff, the Uniform Commercial Code conferring the right of sale not being enacted until 1965. In California, however, according to *Timms*, the lien sale is not a traditional public function and thus is not state action, the warehouseman there having had the right of sale since 1872, when California adopted its first lien sale statute. *Accord, Melara v. Kennedy*, 541 F.2d 802 (9th Cir. 1976).

The focus of inquiry for state action purposes has always been upon the private party and its challenged activities. The question for resolution is whether the State of New York has so far insinuated itself into the warehouseman's lien foreclosure sale to fairly treat the sale as the action of the state itself, through the nexus of the State Legislature's delegation of the power of sale to the warehouseman. *Jackson v. Metropolitan Edison Co., supra*, 419 U.S. at 551; *Moose Lodge No. 107 v. Irvis, supra*, 407 U.S. at 172. The remedies the warehouseman may have had 100 years ago at common law are irrelevant, having no bearing upon the essential question of the exercise of these remedies today.

The State of New York has played no active part in petitioners' sales activity. It has been held, in other due process contexts, that where the state is not itself actively engaged in the conduct complained of, its sole involvement being limited to promulgating or delegating to the private party the power to

carry out the complained of activity, the state has not acted, in the literal sense, in deprivation of rights. *Lucas v. Wisconsin Electric Power Co.*, 466 F.2d 638, 647 (7th Cir. *en banc* 1972), *cert. denied*, 409 U.S. 1114 (1973); *Langevin v. Chenango Court, Inc.*, 447 F.2d 296, 301 (2d Cir. 1971) (". . . . the Government did not itself increase the rents but simply allowed the landlord to institute an increase (without affording opportunity for a prior hearing) . . . ."); *Weigand v. Afton View Apts.*, 473 F.2d 545 (8th Cir. 1973).

The Second Circuit's reliance upon the common law versus statutory origin of the sales right ignores *Ex Parte Virginia*, 100 U.S. 339, 347 (1879):

> "A state acts by its legislature, its executive, *or its judicial authorities.* It can act in no other way." (Emphasis added.)

It is submitted that conferral of a right by the Legislature is not state action anymore than a right established by the common law dispensed by the judiciary, a coordinate branch of state government. In light of the Supreme Court decisions finding state action in judicial rulings (*Shelley v. Kraemer, supra; Barrows v. Jackson, supra*), as well as in legislative enactments (*Nixon v. Condon, supra*), and executive functions such as conducting a referendum election (*Reitman v. Mulkey, supra*), it should not make a difference that a New York warehouseman's sale remedy was conferred by legislative enactment rather than resulting from common law.

2. Outcome of present case.

This is not a case of subterfuge to circumvent the equal protection guaranty, for which the public function theory was originally designed and intended. There is no proof of any evil state purpose in the New York Legislature's investing the warehouseman with the right of "self-help" that warrants

extending the public function doctrine of state action beyond its present confines. Furthermore, to apply the public function fiction in the abstract, based solely upon a theoretical characterization of a legislative enactment 98 years old, lacking any other basis in relevant facts or circumstances, would represent a radical departure from the sifting and weighing mandated by *Burton* and subsequent Supreme Court state action cases, as well as from these cases' substantive requirement of "significant" and "affirmative" state involvement.

This case is controlled by the Supreme Court's consistent holding that where the state merely permits a party to act according to his own dictates, not directly participating in the act itself, nor encouraging the party to act by some form of state assistance or other positive state encouragement, amounting to a direction that the act be undertaken, *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 354-55; *Teleco, Inc. v. Southwestern Bell Tel. Co.*, 511 F.2d 949 (10th Cir. 1975), the state realistically cannot be said to be "significantly" involved in the challenged activity. The state cannot be deemed a "willful participant in joint activity" with the private party, *United States v. Price,* 383 U.S. 787, 794 (1967). Absent such significant, affirmative state involvement, the mere conferral of a governmental function is not state action.

Court-developed legal doctrines should be used to implement, not to frustrate, congressional intent. The Second Circuit's bare reliance upon a public function delegation theory of state action, in addition to its inherent flaws, better awaits another case involving racial discrimination, the main evil that Congress sought to eradicate by its civil rights legislation. The instant case simply does not present "appropriate facts" to warrant such an unprecedented expansion of the state action doctrine. *Burton v. Wilmington Parking Authority, supra,* 365 U.S. at 726.

II.

THE WAREHOUSEMAN'S LIEN FORECLOSURE SALE PURSUANT TO N.Y.U.C.C. §7-210 IS NOT A FUNCTION TRADITIONALLY ASSOCIATED WITH SOVEREIGNTY.

A. The warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not extraordinary.

In *Jackson v. Metropolitan Edison Company, supra,* the Supreme Court said at 419 U.S. 352-353:

> "If we were dealing with the exercise by Metropolitan of some power delegated to it by the state which is traditionally associated with sovereignty, such as eminent domain, our case would be quite a different one."

The majority of the Second Circuit found such a power in the petitioner warehouseman's lien foreclosure sales pursuant to N.Y.U.C.C. §7-210. *Brooks v. Flagg Brothers, Inc., supra* (A174a). This was error.

The rationale behind the Second Circuit's use of the *Jackson* formula is that the sale represents an "extraordinary remedy" which "drastically" alters the warehouseman's nonstatutory powers(A173a, 176a).

A creditor's right of summary sale of collateral to satisfy delinquent charges, without court order, existed at common law, for the benefit of a number of creditors. See Brief, Point I, *supra.* Today, at least 10 types of creditors, in addition to the petitioner warehouseman, are given by statute a right of summary sale to collect delinquent charges.[18]

18 Innkeepers, N.Y. Gen. L. §200, *Blye v. Globe-Wernike Realty Co.,* 33 N.Y.2d 15, —N.E.2d—, 347 N.Y.S.2d 170 (1973); common carriers, (Cont'd)

Further comparison of these parallel sales statutes shows the warehouseman's right of sale, contrary to the Second Circuit's characterizations, to be a fairly unremarkable product of 19th and 20th century legislation in the creditor-debtor field of commercial law. *Davis v. Richmond, supra.*

The differences indicate that the challenged warehouseman's remedy is less drastic than other rights of sale. N.Y.U.C.C. §7-210 does not provide for debtor's liability for deficient sales proceeds. *Contrast* §7-210 *with* U.C.C. §9-504(2). In contrast to §7-210's permissiveness in making a sale optional, an Article 9 secured creditor, including a creditor under retail installment sales of consumer goods, N.Y.U.C.C. §§9-102, 9-203(2), must sell if the debtor has paid sixty per cent of the cash price or sixty per cent of the loan. U.C.C. §9-505(1).

Section 7-210 is extraordinary, if at all, to the extent that it surrounds a warehouseman' sale with meticulous procedures and strict liability. U.C.C. §7-210(2), Comment 1; *contrast* N.Y.U.C.C. §9-504(3). The failure to comply with these provisions mulcts the warehouseman in damages. N.Y.U.C.C. §7-210, Subsec. (9).

A warehouseman's freedom to act is not circumscribed in any way by the optional nature of U.C.C. §7-210. *Lombard v. Louisiana,* 373 U.S. 267 (1962); *Barrows v. Jackson, supra.* The warehouseman can either sue on the debt, U.C.C. §7-210(7), or conduct a lien sale. The Code does not command his course of action. *Peterson v. City of Greenville, supra.* It is a consumer-

(Cont'd)
N.Y.U.C.C. §7-308(1); artisans, Lien L. §§180, 200; factors, U.C.C. §§9-102(2), 9-504(1), 10-102 and repealer schedule annexed, conditional sale vendors, including vendors under retail installment sales, U.C.C. §§9-102(2), 9-203(2), 9-504(1), Personal Prop. L. §§301 *et seq.*, 401 *et seq.;* chattel mortgagee, U.C.C. §9-102(2), 9-504(1); pawnbroker, Gen. Bus. L. §48; banking organizations maintaining safe deposits as bailee for storage, Banking L. §336; lienors under garagekeeper's lien, jewelry and watch repairman's lien, Lien L. §§183-184, 200.

oriented statute beset with pitfalls for the warehouseman who elects to use it. An argument that the statute discourages use of the right of sale is at least as strong as the argument that it encourages use of the right of sale, *Reitman v. Mulky, supra,* for it is small "aid, comfort or incentive" to the warehouseman to know, as stated in *Hackett v. Nelson Express & Storage Co.,* 162 Misc. 444, 294 N.Y.S. 905, 909 (Sup. Ct. 1937), that the warehouseman lien sale statute "seeks to protect the person storing the goods." *Adickes v. S. H. Kress & Co., supra,* 398 U.S. at 212 (Brennan, J., concurring and dissenting).

If the Second Circuit's "drastic power" rationale is adopted, it would mean subjecting to due process requirements, not just the warehouseman's lien sale, but all of the "self-help" practices currently used in New York, none of which are distinguishable as requiring debtor consent for their validity. *See, e.g.,* N.Y.U.C.C. §9-501, Subsec. (1).

B. The warehouseman's right of sale pursuant to N.Y.U.C.C. §7-210 is not an exercise of a function of sovereignty.

The Second Circuit's characterization of the dispute-resolving nature of a warehouseman's lien sale is based upon an erroneous and nonsupportive rationale. In characterizing "binding conflict resolution" as a function of sovereignty, the Second Circuit relies upon the dissenting opinions in two Second Circuit cases. *Shirley v. State Nat'l Bank,* 493 F.2d 739, 747, *cert. denied,* 419 U.S. 1009 (1974) (Kaufman, C.J., dissenting); *Bond v. Dentzer,* 494 F.2d 302, 312, *cert. denied,* 419 U.S. 837 (1974) (Kaufman, C.J., dissenting). *Brooks v. Flagg Bros., Inc., supra* (A174a).

The dissenting opinion relied upon a passage taken from Mr. Justice Harlan's opinion for the Court in *Boddie v. Connecticut,* 401 U.S. 371, 374-375 (1971), holding that the State of Connecticut's denial of access to the courts to initiate divorce proceedings, for inability to pay the filing fees, violated

the indigent plaintiff's due process rights. There are no alternatives to court action, to dissolve a marriage in American society; the state exercises monopoly power over marriage's dissolution. *Id.,* 401 U.S. at 374-75. Conversely, if the state does not monopolize the resolution of a particular type of dispute, then the power it exercises cannot be characterized as a function of sovereignty, since other institutions or individuals in addition to the state resolve the same type of dispute. *Jackson v. Metropolitan Edison Co., supra,* 419 U.S. at 352-353.

It is not traditional for the state alone to resolve commercial disputes. E. Johnson, V. Kantor and E. Schwartz, Outside the Courts: A Survey of Diversion Alternatives in Civil Cases, at 40 (National Center for State Courts 1977). Private ordering and resolution of disputes over a creditor's charges, as noted by Mr. Justice Harlan and by Burke and Reber, would be lost if arbitration or other out-of-court dispute-resolving techniques are considered a delegated function of sovereignty and thus governmental action within constitutional purview. *Boddie v. Connecticut, supra,* 401 U.S. at 375-76; *Wahba v. New York University,* 492 F.2d 96, 102-103 (2d Cir. 1974); 2 Burke and Reber, *supra,* 47 S. Cal. L. Rev. at 42-43, 56; Johnson-Kantor-Schwartz, *supra,* at 1-7, 40.

The warehouseman's lien foreclosure sale is not a function of sovereignty, even though it is of a dispute-resolving nature, since it resolves commercial disputes which are not traditionally an exclusive state function. Judge Kaufman injects the non-consensual nature of "self-help" creditor remedies as an additional element of the dispute-resolving between creditor and debtor that, according to the Second Circuit below, constitutes a function of sovereignty. This attempt to confine the "binding conflict resolution" theory of state action to manageable limits, reserving a desirable sphere of private dispute-resolving, fails. Whether a party consents to it or not, the private resolution of a dispute remains private so long as it is conducted between private parties; to hold otherwise leads to anomalous and undesirable applications of the Constitution.

CONCLUSION

The judgment of the Second Circuit Court of Appeals should be reversed and the case remanded with instructions to dismiss the complaint.

Dated: New York, New York
November 11, 1977

Respectfully submitted,

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APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U. S. Constitution, amend. XIV, §1:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983:

> **"Civil action for deprivation or rights**
>
> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Appendix A

28 U.S.C. §1343:

"Civil rights and elective franchise

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

• • •

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

N.Y.U.C.C. §7-210:

"Enforcement of Warehouseman's Lien

(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in block or in parcels, at any time or place and on any terms which are commercially reasonable, after notifying all persons known to claim an interest in the goods. Such notification must include a statement of the amount due, the nature of the proposed sale and the time and place of any public sale. The fact that a better price could have been obtained by a sale at a different time or in a different method from that selected by the warehouseman is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner. If

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the warehouseman either sells the goods in the usual manner in any recognized market therefor, or if he sells at the price current in such market at the time of his sale, or if he has otherwise sold in conformity with commercially reasonable practices among dealers in the type of goods sold, he has sold in a commercially reasonable manner. A sale of more goods than apparently necessary to be offered to insure satisfaction of the obligation is not commercially reasonable except in cases covered by the preceding sentence.

(2) A warehouseman's lien qn goods other than goods stored by a merchant in the course of his business may be enforced only as follows:

(a) All persons known to claim an interest in the goods must be notified.

(b) The notification must be delivered in person or sent by registered or certified letter to the last known address of any person to be notified.

(c) The notification must include an itemized statement of the claim, a description of the goods subject to the lien, a demand for payment within a specified time not less than ten days after receipt of the notification, and a conspicuous statement that unless the claim is paid within that time the goods will be advertised for sale and sold by auction at a specified time and place.

(d) The sale must conform to the terms of the notification.

(e) The sale must be held at the nearest suitable place to that where the goods are held or stored.

(f) After the expiration of the time given in the notification, an advertisement of the sale must be published once a week for two weeks consecutively in a newspaper of general circulation where the sale is to be held. The advertisement must include a description of the goods, the name of the person on whose account they are being held, and the time and place of the sale. The sale must take place at least fifteen days after the first publication. If there is no newspaper of general circulation where the sale is to be held, the advertisement must be posted at least ten days before the sale in not less than six conspicuous places in the neighborhood of the proposed sale.

(3) Before any sale pursuant to this section any person claiming a right in the goods may pay the amount necessary to satisfy the lien and the reasonable expenses incurred under this section. In that event the goods must not be sold, but must be retained by the warehouseman subject to the terms of the receipt and this Article.

(4) The warehouseman may buy at any public sale pursuant to this section.

(5) A purchaser in good faith of goods sold to enforce a warehouseman's lien takes the goods

free of any rights of persons against whom the lien was valid, despite noncompliance by the warehouseman with the requirements of this section.

(6) The warehouseman may satisfy his lien from the proceeds of any sale pursuant to this section but must hold the balance, if any, for delivery on demand to any person to whom he would have been bound to deliver the goods.

(7) The rights provided by this section shall be in addition to all other rights allowed by law to a creditor against his debtor.

(8) Where a lien is on goods stored by a merchant in the course of his business the lien may be enforced in accordance with either subsection (1) or (2).

(9) The warehouseman is liable for damages caused by failure to comply with the requirements for sale under this section and in case of willful violation is liable for conversion."

APPENDIX B

TABLE OF JURISDICTIONS THAT HAVE ADOPTED UNIFORM COMMERCIAL CODE §7-210

Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Alabama	1965	Ala. U.C.C. §7-210	
Alaska	1962	A.S. §45.05.560	(1) (2)
Arizona	1967	A.R.S. §44-2915	
Arkansas	1961	Ark.Stats. §85-7-210	(1)
California	1963	U.C.C.A. §7210	(3)
Colorado	1965	C.R.S. 1963, §155-7-210	
Connecticut	1959	Gen.Stats. §42a-7-210	(4)
Delaware	1966	5A Del. Code §7-210	
District of Columbia	1963	D.C. Code §28:7-210	
Florida	1965	Fla.Stats. §677.7-210	
Georgia	1962	Ga. Code §109A-7-210	(1)
Hawaii	1965	Haw. U.C.C. §7-210	
Idaho	1967	Idaho U.C.C. §7-210	(5)
Illinois	1961	Ill.Rev.Stats.ch.26,§7-210	
Indiana	1963	Ind. Stats. §19-7-210	

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Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Iowa	1965	Iowa Code ch. 554, §7210	
Kansas	1965	K.S.A. §84-7-210	
Kentucky	1958	K.R.S. §355.7-210	
Maine	1963	Me. R.S. Title 11, §7-210	
Maryland	1963	95B Md. Code §7-210	
Massachusetts	1957	G.L. ch. 106, §7-210	(6)
Michigan	1962	C.L. §440.7210	
Minnesota	1965	Minn.Stats. §366.7-210	
Mississippi	1966	Miss.U.C.C. §7-210	
Missouri	1963	Mo. U.C.C. §7-210	
Montana	1963	R.C.M. §87A-7-210	
Nebraska	1963	Neb. U.C.C. §7-210	(1)
Nevada	1965	8 Nev. R.S. §7-210	
New Hampshire	1959	N.H.Rev.Stats. §382-A:7-210	
New Jersey	1961	N.J. Stats. §12A:7-210	(1)
New Mexico	1961	N.M.Stats. §50A-7-210	

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Jurisdiction	Year Enacted	Statutory Citation	Local Variations
New York	1962	N.Y. U.C.C. §7-210	
North Carolina	1965	G.S. §25-7-210	
North Dakota	1965	N.D.Cent.Code §41-07-16	
Ohio	1961	R.C. §1307.15	(1)
Oklahoma	1961	Okla. Stats. 12A §7-210	(1)
Oregon	1961	O.R.S. §77.2100	(1)
Pennsylvania	1953	12A P.S. §7-210	
Rhode Island	1960	R.I.G.L. §6A-7-210	(1)
South Carolina	1966	S.C. Code §10.7-210	
South Dakota	1966	S.D.C.L.1967, §§57-26-24-57-26-32	
Tennessee	1963	Tenn. Code §47-7-210	(7)
Texas	1965	Tex. U.C.C. §7-210	
Utah	1965	Utah Code §70A-7-210	
Vermont	1966	9A Vt. Stats. §7-210	
Virgin Islands	1965	11A V.I. Code §7-210	
Virginia	1964	Va. U.C.C. §7-210	

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Jurisdiction	Year Enacted	Statutory Citation	Local Variations
Washington	1965	R.C.W. 62A.7-210	
West Virginia	1963	W. Va. Code ch.46, §7-210	
Wisconsin	1963	Wis. Stats. §407.210	(8)
Wyoming	1961	Wyo. Stats. §34-7-210	(1)

(1) Subsection (2)(b) of this State's §7-210 does not permit mailing of notice by certified mail.

(2) Subsection (2)(f), A.S. §45.05.560 (Alaska), requires posting of advertisement in three conspicuous places.

(3) Subsection (2)(f), U.C.C.A. §7210 (California), adds requirement that a newspaper be one "in the judicial district" where the sale is to be held.

(4) Subsection (2)(b), Gen. Stats. §42a-7-210 (Connecticut), adds requirement that notice sent by certified mail be receipted for by the addressee.

(5) Subsection (1), Idaho, U.C.C. §7-210, substitutes "this" for "his" preceding the word sale in the fourth sentence.

(6) Subsection (1), G.L. ch. 106, §7-210 (Massachusetts), fourth sentence, starts out, "If the warehouseman in good faith for the purpose of avoiding or reducing loss and of effective realization either sells the goods," rather than "If the warehouseman either sells the goods. . . ."

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(7) Subsection (2)(b), Tenn. Code §47-7-210, substitutes word "mail" for word "letter".

(8) Subsection (2)(f), Wis. Stats. §407.210, substitutes reference to general statutory provisions governing notices in place of the U.C.C. requirements as to permissible newspapers in which to place the advertisement and the number of times the advertisement must be published. The minimum 15-day waiting period between first publication and sale is omitted.

SOURCES: 1 Uniform Laws Ann., Uniform Commercial Code §§1-101 to 2-725 (1968) at XXXVII.

3 R.Anderson, Uniform Commercial Code §7-210:3 (2d Ed.1971) (pocket part Jan., 1977).

APPENDIX C

SESSION LAWS, CHAP. 336, PAGE 417

"AN ACT to enable storage warehousemen to collect their charges upon goods deposited with them by the sale thereof.

Passed May 19, 1879

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Every warehouse company, or person or persons, engaged in the warehouse business who shall have had in their possession any goods, wares, or merchandise by virtue of an agreement or warehouse receipt for the storage of the same on which or any part thereof there may be due two years' storage, may proceed to sell the same at public auction, and out of the proceeds may retain the charges for storage of said goods, wares, and merchandise, and any advances that may have been made thereon by him and the expense of advertising and sale thereof; but no such sale shall be made until after the giving of a printed or written notice of such sale, containing a description of the articles to be sold, together with the name of the person or persons storing the same, nor until six months after termination of the time for which such goods were received.

§2. The notice required by the last preceding section shall be served personally, at least four weeks before the time of such sale upon the party storing the goods, provided such service can be

made with reasonable diligence within the State of New York. If the party storing such goods cannot with reasonable diligence be found within the State of New York, then such notice shall be given by publication once in each week for six successive weeks, before the time of such sale in a newspaper published at or nearest the place, when such sale is to take place. In the event that the party storing such goods or merchandise shall have parted with the same, and the purchaser shall have notified the warehouseman with his address, such notice shall be given to such person in lieu of the person storing the goods.

§3. Such warehouse company, or person or persons, engaged in the warehouse business, shall make an entry in a book kept for that purpose of the balance or surplus of the proceeds of the sale, if any, and such balance or surplus shall be paid over to such person or persons entitled thereto within thirty days after such sale and after the expiration of said thirty days such balance or surplus shall be paid by such warehouse company, or person or persons, engaged in the warehouse business to the county treasurer; or if in the city of New York to the chamberlain of said city, for the use of the poor, unless called for or claimed by the rightful owner within five years after the receipt thereof, and shall at the same time file with said treasurer or chamberlain an affidavit in which shall be stated the name and place of residence, so far as the same are known, of the person whose goods or merchandise have been sold, the articles sold and the prices at which they were sold, the name and residence of

the auctioneer making the sale, together with a copy of the notice published and how served, whether by personal service or by mailing, and if not so served the reason therefor.

§4. This act shall take effect immediately."